U.S. CONSUMER PRODUCT SAFETY COMMISSION
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STATEMENT OF COMMISSIONER ANNE M. NORTHUP REGARDING THE CONSUMER PRODUCT SAFETY ENHANCEMENT ACT OF 2010

April 29, 2010

Chairman Rush, Ranking Member Whitfield, Chairman Waxman and Ranking Member Barton, thank you for the opportunity to submit a statement for the record today on the proposed Consumer Product Safety Enhancement Act of 2010. From my experience as a Member of Congress, I know that Congress frequently must revisit legislation to refine the scope or adjust the application of a law to avoid consequences that were neither intended nor foreseen by the original drafters. Although this initial effort contains some positive steps, I believe the bill before you falls short of resolving the problems with the statute I have witnessed since joining the Commission last August.

Last summer, in the course of my confirmation process, I met with many Members of the Senate Commerce Committee. Every Senator—from both parties—asked me to recognize and apply the flexibility in the law with respect to the new lead content limits. They had heard from their constituents and were, frankly, surprised to learn the scope of children's products that were affected by the CPSIA. They pointed to the exclusions for certain products or components in the law that they originally thought were sufficient: 1) Products that would not "result in the absorption of any lead"; 2) Inaccessible parts; and 3) Certain electronic devices. It was specifically the first exclusion, the so-called Absorbability Exclusion, that they believed could be interpreted in a way to bring rationality to the new lead content provisions. After all, if a child cannot absorb the lead in any measurable or risky amount, then it is simply not unsafe or unhealthy.

However, when I got to the Commission, the General Counsel's office had already interpreted the Absorbability Exclusion in a way that not one single product could qualify for it. The staff had determined that "any" means "zero" and that even in a product where lead is used for strength or machinability, and even where the small amount of lead embedded in a metal item (zippers, bicycles, hardware on cribs, etc.) could only be transferred in infinitesimal amounts, the product would still fail the "any lead" test. Unfortunately, a majority of the Commission upheld the staff's interpretation, preventing us from allowing businesses making safe products to use the Absorbability Exclusion.

I assume that Congress intended the Absorbability Exclusion to actually mean something, to apply to at least some products where the lead content could not harm the health or safety of a child. If this Congress would clarify that existing exclusion, this functional purpose bill would be unnecessary. This clarification could be done by simply removing the word "any" from the statute or by inserting language to define "any" so lead "cannot be absorbed at a level that could cause a measureable change in a child's blood lead level."

Government health agencies like the CDC, EPA, and NIH do not advise parents of children at risk for elevated blood lead levels not to buy clothes with metal zippers or furniture with brass handles. These cutting-edge public health agencies do not instruct parents to prevent their children from riding bicycles,

playing brass instruments, or playing with metal toys. Why not? Because these agencies know lead in the substrate of such items poses no real risk to a child. No government agency responsible for reducing lead levels in children has found that embedded lead in the substrate will raise blood lead levels from normal hand-to-mouth transfer. The CPSC can regulate lead in paint and potentially hazardous swallowable items like children's jewelry without imposing arbitrary total lead content limits and draconian third-party testing and certification requirements on each component of every children's product.

Ironically, the items *excluded* from the relief this bill purports to offer thrift stores and small batch makers—such as "children's metal jewelry" and "painted children's toys"—illustrate that we understand where the real risk lies. Children's metal jewelry and painted children's toys are precisely the areas where the CPSC has previously found genuine lead exposure to exist, which is why today's proposal does not include those items (and maintains the ban on selling recalled items). Yet these exceptions to the intended relief from the law show that the original law itself has it entirely backwards. Rather than (1) ban the sale of lead-containing items, and then (2) exclude thrift stores from this general ban, and then (3) exclude certain specific items from the general thrift store exclusion, it would be *much* simpler to only have the CPSIA apply in the first place to children's metal jewelry, painted children's toys, and other children's products whose lead content the CPSC finds to be hazardous.

The proposed Functional Purpose Exemption does not provide the kind of broad exclusion flexibility that the CPSC unanimously sought from Congress in our January report. The new exclusion is written with so many complex limitations that its usefulness is questionable, it will require enormous resources in order to submit and consider a petition (thereby eliminating that option for the vast majority of small companies), and it will result in subjective findings by the Commission.

One criterion for the exception you are suggesting is that the product "will have no measurable adverse effect on public health or safety." Why would there need to be any further criteria? Why must a company then *also* show that the item "requires the inclusion of lead"? Why must it show that it is "not practicable or not technologically feasible to manufacture" with lower amounts of lead when the current level already has no measurable adverse effect on safety? Why must it also demonstrate that "making the lead inaccessible" is not practicable or technologically feasible? Why must it prove that the item "is not likely to be placed in the mouth or ingested"? The mere fact that the item will have "no measurable adverse effect on public health or safety" ought to suffice.

Regulating lead content so minutely squanders taxpayer dollars that could be put toward policing genuine risks. It also wastes finite compliance resources to have the agency play gatekeeper over which harmless products can or cannot demonstrate a functional need for the lead embedded in them. Forcing a component-by-component petition for exceptions does nothing to enhance safety, and it converts the Commission from a safety oversight agency (like the FAA) into a product approval agency (like the FDA). Rather than spend most of its time and resources removing unsafe products from the market, the agency would devote its efforts to approving perfectly safe products before they go on the market. That switch would also slow the pace of consumer product innovation by increasing the cost and lead time for companies to bring new products to market—which effect itself carries negative safety ramifications.

Another effect of requiring such complicated additional factors will be to continue to prohibit many products that pose no risk to children, which is the very problem with the CPSIA that the functional purpose exemption claims to solve. Piling on such criteria just makes it more difficult to apply for exclusions—so

much so that it raises the question whether deterring petitions for perfectly safe products is precisely the point. Regulating lead below levels that pose a health or safety concern, for whatever ulterior motive, is not appropriate for a safety agency and doing so takes significant agency attention and resources away from genuine safety issues.

Many safe products will not be able to afford to seek a Functional Purpose Exemption, and relatively few exceptions will be sought (and fewer granted) for products with small profit margins. The needlessly expensive exemption process ensures that only large or well-heeled manufacturers can take advantage of it, because they are the ones who can spread out the cost over many products. For comparison's sake, my office has learned that the ballpoint pen industry spent upwards of $35,000 to obtain an opinion letter from the Commission explaining that most ballpoint pens are not "children's products" subject to the CPSIA. And that opinion letter was a far less involved process and a far lower burden of proof than what the functional purpose petition exception would demand. Nor do most companies have the in-house expertise (metallurgic, etc.) to make the kind of showings that would be required to meet the component-by-component burden of proof for exceptions. So, just as the exorbitant testing costs of the CPSIA favor large companies (who manufacture and test overseas where the testing costs are less expensive) over small ones (who are more likely to manufacture and test domestically where testing costs are higher), so too will the exemption process favor the large companies with greater mass production.

The subjective exemption process also creates uncertainty, something which already abounds in the CPSIA. The agency is not required to undertake any action on its own, and the petitioning process will consume a considerable yet unpredictable amount of time. Moreover, permitting the agency to require expiration dates for any exceptions granted further deters seeking exemptions, because an applicant cannot be certain at the outset what the value of an exemption will be even if one is granted. Also, it is unlikely that the Commission would be able to prioritize a large number of petitions when real dangers require its attention. Making the 100ppm lead content limit prospective at least avoids the needless market disruption caused by the retroactive 300ppm limit, but the bill should repeal the 100ppm limit for lead in substrates altogether.

The reseller and small-batch manufacturer provisions in the bill are too narrow to provide much relief. The bill requires resellers to prove that donors do not have knowledge of violative lead content and that donors purchased donated items for use and not for resale. Such provisions will be hard to satisfy given the anonymous nature of many donations. Furthermore, by defining a small-batch manufacturer as one who makes no more than 7,500 units per year of anything, *and* has gross receipts of less than $50,000 for a qualifying item, *and* has total gross receipts of no more than $1,000,000 for the whole business, this bill offers testing relief to an exceedingly small slice of the manufacturing community. In fact, the bill would offer *less* relief in this regard than the testing rule that the agency is already promulgating! The testing and certification rule (also known as the "15-month rule") now in process offers flexibility on continuing testing obligations to low-volume manufacturers who make less than 10,000 units of a given product with no gross receipts qualifiers whatsoever and no consideration of other products that manufacturer produces. Since the CPSC would pursue any company, regardless of its size, that made an unsafe product, there is no need to be so prescriptive with the testing relief. The agency should be given the flexibility to try different approaches and see what produces the best combination of compliance and workability.

While I support the creation of something akin to the bill's Office for Education, Outreach, and Small Business Ombudsman, Congress does not need to mandate this. The Commission already has begun

planning for such an entity. Furthermore, writing it into law could freeze in place a position that may become unnecessary over time or less valuable than other demands, thereby preventing the agency from allocating its education, outreach, and ombudsman advocacy resources most efficiently.

I have explained in some detail my concerns with this bill's approach to the lead problem. However, there are other areas of concern that this bill does not address, including: the statute's disregard of risk, its overly broad coverage of products for children up to age 12, the duplicative testing it causes, and the tremendous burden that testing for phthalates and the F-963 toy standard will represent (which this bill's small-batch manufacturer relief provisions will not solve because those producers will not be able to perform the sophisticated testing required to assure compliance). Given what I have discovered during my first year as a Commissioner, I believe that the impact of these problems has not yet been fully realized.

I appreciate your time and attention to these important issues. The bill before you today will not avert the many unintended consequences the CPSIA has created. However, I am eager to continue working with this Committee to accomplish that objective. All consumers want safe products, but they also want a vibrant marketplace that sustains a diversity of products and small businesses. Both goals are achievable.